

FOREWORD: A LENS FOR LAW AND ENTREPRENEURSHIP

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At a recent interdisciplinary academic conference, a lawyer-sociologist offered an irreverent test for determining a scholar's primary field of inquiry: never mind the methodology, where is the work actually published? If you publish in sociology journals, you are a sociologist; if you publish in law reviews, you are a legal academic.¹ On similar logic, publishing in the *Ohio State Entrepreneurial Business Law Journal* would seem to align an author with the nascent field of law and entrepreneurship. Well, yes and no.

In this Foreword, I affirm the value of legal scholarship concerning entrepreneurship but question whether law and entrepreneurship is a "field" in that it involves a "discrete factual setting [that] generates the need for distinctive legal solutions."² First, there is the problem of identifying the relevant factual setting—what is entrepreneurship?³ Perhaps entrepreneurship is simply the output of individual "entrepreneurs—people with the ideas, the vision, and the perseverance to launch . . . new

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¹ Dr. Nadia Bernaz, Remarks at the Emory University School of Law, Feminism and Legal Theory Workshop, Social Vulnerability and the "Corporation" (Oct. 30, 2010).

² Darian M. Ibrahim & D. Gordon Smith, *Entrepreneurs on Horseback: Reflections on the Organization of Law*, 50 ARIZ. L. REV. 71, 76 (2008) (contending "that 'law and entrepreneurship' merits consideration as a separate field of legal study"). A further question addressed in this Foreword is whether the discrete-facts, distinctive-law approach to defining a field is a useful way of defining a field.

³ See, e.g., David E. Pozen, *We Are All Entrepreneurs Now*, 43 WAKE FOREST L. REV. 283, 285 (2008) ("Theories of entrepreneurship abound, but we have no completely satisfying synthetic account of the practice, and we probably never will."); Pramodita Sharma & James D. Chrisman, *Toward a Reconciliation of the Definitional Issues in the Field of Corporate Entrepreneurship*, 23 ENTREPREN. THEORY AND PRAC. 11, 12 (1999) ("Entrepreneurship has meant different things to different people.").

businesses.”⁴ If so, then law and entrepreneurship concerns the legal needs of small, startup business ventures.⁵

However, it is not enough to identify a factual context if there is no deeper conceptual explanation for what counts as entrepreneurship.⁶ In an effort to supply the theoretical underpinning, Professor Darian Ibrahim and Dean D. Gordon Smith contend that “[e]ntrepreneurship involves new products or services, new ways of organizing, or new geographic markets.”⁷ Although the definition gives us a very useful conceptual framework, it creates uncertainty as to whether law and entrepreneurship encompasses more than startup ventures; after all, any business that hopes to remain successful in a competitive marketplace will, to some degree, be entrepreneurial.⁸ Thus, it is not clear if entrepreneurship is about “getting [novel] things done”⁹ or if it is about novel businesses.¹⁰

⁴ *Mission Statement at Faber Entrepreneurship Center*, THE DARLA MOORE SCH. OF BUS. U. OF S.C., <http://mooreschool.sc.edu/facultyandresearch/researchcenters/faberentrepreneurshipcenter/mission.aspx> (last visited Feb. 8, 2011).

⁵ See, e.g., Landon Thomas, Jr., *What’s Broken in Greece? Ask an Entrepreneur*, N.Y. TIMES, Jan. 30, 2011, at B1 (describing legal impediments to brewer’s efforts “to have his brewery produce and export bottles of a Snapple-like beverage made from herbal tea”). Unfortunately for the brewer, Demetri Politopoulos, “[a]n obscure edict requires that brewers in Greece produce beer—and nothing else.” *Id.* (“‘It’s probably a law that goes back to King Otto,’ said Mr. Politopoulos with a grim chuckle, referring to the Bavarian-born king of Greece who introduced beer to the country around 1850.”).

⁶ Scott Shane & Sankaran Venkataraman, *The Promise of Entrepreneurship as a Field of Research*, 25 ACAD. OF MGMT. REV. 217, 217 (2000) (“What appears to constitute entrepreneurship research today is some aspect of the setting (e.g. small businesses or new firms) rather than a unique conceptual domain.”). Indeed, if entrepreneurship is simply self-employment, then it includes the laid off as well as those who choose to own their own businesses. See Robert B. Reich, *Entrepreneur or Unemployed?*, N.Y. TIMES, June 1, 2010, at A25 (“Booted off company payrolls, millions of Americans had no choice but to try selling themselves. Another term for ‘entrepreneur’ is ‘self-employed.’”). Reich contends that to treat workers who accept employment through temp agencies as entrepreneurs because they are, technically, self-employed is to “miss[] one of the most significant changes to have occurred in the American work force in many decades.” *Id.* (describing phenomenon of “involuntary entrepreneurship”).

⁷ Ibrahim & Smith, *supra* note 2, at 84 (citing JOSEPH A. SCHUMPETER, *THE THEORY OF ECONOMIC DEVELOPMENT: AN INQUIRY INTO PROFITS, CAPITAL, CREDIT, INTEREST, AND THE BUSINESS CYCLE* 66 (Redvers Opie trans., 3d prtg., Harvard Univ. Press 1949)).

⁸ See, e.g., Thomas M. Hult & David J. Ketchen, *Does Market Orientation Matter?: A Test of the Relationship Between Positional Advantage and Performance*, 22 STRAT. MGMT. J. 899 (2001). According to one definition, “corporate entrepreneurship encompasses the birth of new businesses within existing businesses and the transformation (or rebirth) of organizations through a

Second, conflating novel ideas with novel businesses elevates the distinctive needs of high-tech, venture-capital backed firms over the more prosaic legal issues faced by more typical small businesses.¹¹ As a general matter, new businesses involve little in the way of innovation.¹² Yet, in terms of job creation and overall impact on the economy, run-of-the-mill businesses outpace their high-tech counterparts.¹³ For restaurants, flower

renewal of their key ideas.” Sharma & Chrisman, *supra* note 3, at 16 (citing W.D. Guth & A. Ginsberg, *Guest Editors’ Introduction: Corporate Entrepreneurship*, 11 STRAT. MGMT. J. 5 (1990)). The difficulty of distinguishing innovation in established firms becomes apparent when we approach the question from the other direction: What would make a business *non-entrepreneurial*? A steadfast refusal to innovate or to adapt to changed market conditions? Sheer size?

⁹ D. Gordon Smith & Masako Ueda, *Law and Entrepreneurship: Do Courts Matter?*, 1 ENTREPREN. BUS. L.J. 353, 354–55 (2006).

¹⁰ See *id.* at 356 (distinguishing entrepreneurship from innovative “intrapreneurship” of established firms). Although they do not explicitly exclude established firms, Ibrahim and Smith assert that “entrepreneurship offers psychic benefits for those who wish to be their own boss,” contend that “improvements in existing processes or within existing ‘means-end frameworks’ do not constitute entrepreneurship,” and cite SEC rules that impact startup funding as evidence that the law shapes entrepreneurial opportunities. *Id.* at 81, 84, 86 (“[C]ritics argue that the SEC could do even more to facilitate start-up funding . . . These arguments implicitly recognize entrepreneurship as an important organizational category.”).

¹¹ I should clarify that novelty and high technology are not synonymous. One could image high-tech startups involving fairly redundant products and services as well as highly innovative businesses that use very little technology—for instance, a new assembly line method for providing a service that previously required individual preparation.

¹² See, e.g., Elizabeth Olson, *They May Be Mundane, but Low-Tech Businesses Are Booming*, N.Y. TIMES, Apr. 28, 2005, at C6 (“Forget web sites and molecular imaging. The biggest fields of opportunity for aspiring entrepreneurs are the same mundane ventures that have been kicking around for decades. Think landscaping companies, child-care providers, janitorial services and nail and hair salons.”). Olson observes “a truth about American entrepreneurship that is often lost in the breathless news coverage of the latest Silicon Valley start-up or biotechnology wonder: most of the growth involves tried-and-true undertakings that are unlikely to yield overnight riches but are open to anyone with tenacity and grit.” *Id.* Ibrahim and Smith note this distinction and state that “[e]ntrepreneurial opportunities may be novel in a strong sense, which typically implies a technological breakthrough backed by venture capital financing, or they may be novel in a weak sense, such as opening a new restaurant in a vacant building.” Ibrahim & Smith, *supra* note 2, at 84–85.

¹³ See Steven H. Hobbs, *Toward a Theory of Law and Entrepreneurship*, 26 CAP. U. L. REV. 241, 241 (1997) (citing David J. Brophy, *Prospects for Small Business in the 21st Century*, in THE THIRD MILLENNIUM: SMALL BUSINESS AND ENTREPRENEURSHIP IN THE 21ST CENTURY (A SPECIAL PUBLICATION PREPARED FOR DELEGATES TO THE 1995 WHITE HOUSE CONFERENCE ON SMALL BUSINESS))

shops and automotive parts suppliers, key legal issues are more likely to involve the governance disputes that no one anticipated than sophisticated financing arrangements. Accordingly, if law and entrepreneurship is a field defined by a distinctive factual context—small business ventures—then the field's core concerns include basic business planning and shareholder oppression law.¹⁴

Instead of debating the boundaries of law and entrepreneurship as a field, I use the metaphor of a lens to contend that law and entrepreneurship should be understood more as a perspective than as a subject of inquiry. Law and entrepreneurship scholars need not restrict their focus to small-business creation and can explore how law and innovation relate in a wide variety of contexts.¹⁵ For instance, it would be interesting to explore whether it is possible to reduce the tension between law's reflexive conservatism¹⁶ and the dynamism that engenders new forms of commercial activity, social relationships and institutions.¹⁷ Thus, the value of law and entrepreneurship does not depend upon the successful construction of a notional, separate space where entrepreneurial issues arise.¹⁸

21–22 (1995) (stating that small business accounted for most new jobs and 99.7% of all private sector employees).

¹⁴ See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL AND THOMPSON'S CLOSE CORPORATIONS AND LLCs: LAW AND PRACTICE (Thomson rev. 3d ed. 2004).

¹⁵ See, e.g., EMILY CHAMLEE-WRIGHT, THE CULTURAL AND POLITICAL ECONOMY OF RECOVERY: SOCIAL LEARNING IN A POST-DISASTER ENVIRONMENT 54 (2010) (describing “entrepreneurial leadership” as “the ability to see a situation in ways that most others have missed—to recognize the grain of opportunity in a sea of obstacles—and then act to seize that opportunity”). The recent expansion of the term entrepreneurship to new domains has itself been entrepreneurial. See Pozen, *supra* note 3, at 283. (“Everyone, it seems, is an entrepreneur these days. People who tackle civic problems through innovative methods are ‘social entrepreneurs.’ Those who promote new forms of legislation or government action are ‘policy entrepreneurs.’”).

¹⁶ See Martha Minow, *The Properties of Family and the Families of Property*, 92 YALE L.J. 376, 392 n.109 (1982) (“[T]he law is conservative in the same way in which language is conservative . . . It seeks to relate any new phenomenon to what has already been categorized and dealt with.”) (quoting Richard Wasserstrom, *Postscript: Lawyers and Revolution*, 30 U. PITT. L. REV. 125, 129 (1968)); Jesse Lemisch, *Radical Plot in Boston (1770): A Study in the Use of Evidence*, 84 HARV. L. REV. 485, 504 (1970) (noting that “it is a cliché that the law is conservative”).

¹⁷ NEIL FLIGSTEIN, THE ARCHITECTURE OF MARKETS 9 (2001) (“A subfield should contain a small number of common questions that focus research and get scholars to pay attention to one another’s work.”).

¹⁸ Nor, for that matter, does the value of small business and entrepreneurship centers and clinics turn on the status of entrepreneurship as an academic field within legal studies.

The argument proceeds as follows. Part I trots out the familiar “Law of the Horse” objection to the establishment of new fields of legal scholarship.¹⁹ According to this standard, a viable legal field must be internally coherent and its coherence must derive from factual characteristics with distinctive legal significance.²⁰ Part II argues that, given those conditions, law and entrepreneurship does not appear to qualify as a separate field of study. Part III defends an alternative approach to defining fields of inquiry and contends that law and entrepreneurship has more to offer as a perspective than as a subject.

Ultimately, though, this Foreword is more a quibble than a challenge. If the legal profession continues to insist upon a separate field of law and entrepreneurship as a category within legal studies, then there will be a field. Its boundaries may be unclear, but, if it is helpful to practitioners, judges, and academics, law and entrepreneurship will join already well-established fields such as cyberlaw, employment law, environmental law, sports law, and, for that matter, equine law.

I. DEFINING A FIELD

Offering some of the least welcoming remarks ever, Judge Frank H. Easterbrook, who also holds an appointment at the University of Chicago Law School, greeted attendees at a “Law of Cyberspace” conference with the news that they were all wasting their time.²¹ As one of the attendees recalled:

Judge Frank Easterbrook told the assembled listeners, a room packed with “cyberlaw” devotees . . . that there was no more a “law of cyberspace” than there was a “Law of the Horse”; that the effort to speak as if there were such a law would just muddle rather than clarify . . . “[g]o home,” in effect, was Judge Easterbrook’s welcome.²²

The central thrust of Judge Easterbrook’s argument was that the organizing “fact” for cyberlaw—the Internet—has no more legal relevance than a horse. That is to say any dispute arising in the context of the

¹⁹ See Ibrahim & Smith, *supra* note 2, at 72 (“The short of the critique, of course, is that the horse is not a very useful organizing principle for the study of law.”).

²⁰ See Todd S. Aagaard, *Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy*, 95 CORNELL L. REV. 221, 225 (2010). Similarly, Ibrahim and Smith contend that “a new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions.” Ibrahim & Smith, *supra* note 2, at 76.

²¹ These remarks were later published. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207.

²² Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501 (1999).

Internet, like any dispute involving a horse, can readily be answered using existing legal categories like intellectual property and contract.²³ A bargain is a bargain, after all, whether the goods to be exchanged are horses or software.²⁴

For a set of factual circumstances to demand a novel legal response as opposed to the application of existing law, the facts must not be susceptible to appropriate resolution under existing legal rules of general applicability. Professor Todd Aagaard describes a method for evaluating whether a factual setting shapes legal rules to an extent that can support an independent field of legal study:

We can conceptualize a legal field as the interaction of four underlying constitutive dimensions of the field: (1) a factual context that gives rise to (2) certain policy trade-offs, which are in turn resolved by (3) the application of values and interests to produce (4) legal doctrine. An organizational framework for a field identifies the field's common and distinctive patterns, which may arise in any of these underlying constitutive dimensions. The more that common and distinctive features predominate within the field, the more useful the field is likely to be as an analytical category.²⁵

Distilled, the test is whether there are distinctive facts that call for a tailored legal approach.²⁶ Thus, “[w]e designate legal fields . . . on the premise that those designations identify something important about how the law operates.”²⁷ Perhaps because a topic's status as a legal field is seen as a

²³ Easterbrook, *supra* note 21, at 208.

²⁴ What counts as performance in each case may vary considerably, but only as a matter of specific, factual analysis of industry norms. The basic rules of contract interpretation would apply equally.

²⁵ Aagaard, *supra* note 20, at 225.

²⁶ See Ibrahim & Smith, *supra* note 2, at 76 (“[A] new field of legal study is justified when a discrete factual setting generates the need for distinctive legal solutions.”). Another way of asking the question is whether existing legal categories suffice to explain the phenomenon at issue: “[f]or a field of social science to have usefulness, it must have a conceptual framework that explains and predicts a set of empirical phenomena not explained or predicted by conceptual frameworks already in existence” Shane & Venkataraman, *supra* note 6, at 217.

²⁷ Aagaard, *supra* note 20, at 224.

rough proxy for its importance,²⁸ scholars have not hesitated to defend their chosen fields of inquiry from the charge of non-distinctiveness.²⁹

II. LAW AND ENTREPRENEURSHIP AS FIELD

In order to counter Judge Easterbrook's objection on its own terms, therefore, the proponents of law and entrepreneurship must show that the field has a coherent subject matter and that the characteristics that lend it coherence also have legal significance. To satisfy their burden, the proponents must answer two basic questions. First, what is entrepreneurship? Second, is there evidence to support the claim that "entrepreneurship is not only an interesting fact, but a *legally relevant* one?"³⁰ As discussed below, no fully satisfying answer exists for either question and law and entrepreneurship therefore appears to lack the distinctiveness that would merit recognition as a field defined by a "discrete factual setting" that calls for "distinctive legal solutions."³¹

A. *Locating Entrepreneurship*

A definition of the field might begin with the observation that "entrepreneurship reveals how the law deals with *novelty*."³² If entrepreneurship is not to collapse into existing intellectual property law, however, it must be about more than just innovation.³³ Professor Ibrahim and Dean Smith suggest that entrepreneurship is "novelty as applied to *opportunities*."³⁴ Yet, it is not clear that this qualification succeeds in distinguishing entrepreneurship from intellectual property law. To identify

²⁸ *Id.* ("The law works through categories, and one of the more important types of categories employed in the law is the legal field.").

²⁹ Even the law of the horse has its defenders. See Joan S. Howland, *Let's Not Spit the Bit in Defense of "The Law of the Horse": The Historical and Legal Development of American Thoroughbred Racing*, 14 MARQ. SPORTS L. REV. 473 (2004).

³⁰ Ibrahim & Smith, *supra* note 2, at 84 (emphasis in original).

³¹ *Id.* at 76. As discussed *infra* Pt.III, an alternative course would be to adopt a different definition of an academic field as a series of shared questions—a critical focus that generates productive insights. See FLIGSTEIN, *supra* note 17, at 9. Because this strikes me as a more useful way of defining fields of inquiry, I agree with Ibrahim and Smith (though perhaps for different reasons) that "[a]s applied to law and entrepreneurship . . . the Law of the Horse is 'a catchy put-down, but with very little substance.'" Ibrahim & Smith, *supra* note 2, at 72 (quoting Henry T. Greely, *Some Thoughts on Academic Health Law*, 41 WAKE FOREST L. REV. 391, 406 (2006)).

³² Ibrahim & Smith, *supra* note 2, at 84 (emphasis in original).

³³ See *id.* ("[O]ther fields also show us how law deals with novelty. Patent law, for example, embraces 'novelty' as one of the core elements of patentability.").

³⁴ *Id.* (emphasis in original).

something as an “opportunity” implies that it is potentially useful. Notably, every meritorious patent application must demonstrate not only that the invention is novel and non-obvious but also that it is “useful.”³⁵ The qualification of novelty in both cases seems roughly analogous.

Moreover, if the factual context for entrepreneurship is “small businesses or new firms,”³⁶ then novelty becomes superfluous. A novel business is not the same thing as a novel business idea.³⁷ To assume that business innovation and startups are synonymous is to value entrepreneurial activities only when they are undertaken by new ventures. In fact, more mature companies can also provide novel goods, services, and methods of organization.³⁸ However, if we admit that questions about novelty and opportunity apply across the entire range of commercial activity and not just in the context of startup business organizations, we undermine the claim that entrepreneurship involves a distinctive factual setting.³⁹

³⁵ Section 101 of the United States Patent Act states “[w]hoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvements thereof, may obtain a patent, subject to the conditions and requirements of this title.” 35 U.S.C. § 101 (2006). Of course, an entrepreneur might identify an opportunity to profit based upon new information, regardless of whether the information was itself subject to protection under patent or copyright law or even as a trade secret. Thus, the relevant scope of innovation for entrepreneurship could be broader than what would count under existing intellectual property law. Further, at least as a matter of emphasis, it is probably fair to state that entrepreneurship focuses on the process of capitalizing on an idea rather than on its protectability *per se*.

³⁶ Shane & Venkataraman, *supra* note 6, at 217. If the task were to define an “entrepreneur,” rather than the concept of “entrepreneurship,” a focus on new business would make more sense.

³⁷ Dean Smith and Professor Ueda recognize the distinction and “restrict [their] attention to ‘getting novel things done’ by new for-profit enterprises.” Smith & Ueda, *supra* note 9, at 356. However, as they acknowledge, this excludes “entrepreneurial activities by established firms.” *Id.* (“[W]e gain little in the present context from mixing the two forms of entrepreneurship together.”). They define “law and entrepreneurship” as “the study of the optimal legal structures that facilitate the commercialization of entrepreneurial opportunities, as well as the regulation of entrepreneurial firms.” *Id.* at 357.

³⁸ See, e.g., R.A. BURGELMAN & L.R. SAYLES, *INSIDE CORPORATE INNOVATION: STRATEGY, STRUCTURE, AND MANAGERIAL SKILLS* (1986). For instance, JPMorgan Chase first developed quantitative formulas for assessing market risk, a revolutionary methodology that enabled banks to take on and manage higher levels of risk than had previously been possible, never mind the eventual consequences. See JOHN CASSIDY, *HOW MARKETS FAIL: THE LOGIC OF ECONOMIC CALAMITIES* 275 (2009).

³⁹ Another possible explanation for why entrepreneurship scholarship focuses on startup businesses is that data collection is driving the inquiry. See SCOTT SHANE, *A GENERAL THEORY OF ENTREPRENEURSHIP: THE INDIVIDUAL-OPPORTUNITY*

A related problem for a novelty-focused definition of entrepreneurship is that many small business ventures involve little in the way of novelty. The visionary-in-a-basement idea of entrepreneurship distorts our perception of small businesses. Gifted individuals like Steve Jobs and Bill Gates may seem like the standard bearers for entrepreneurship, but they are a tiny exception afloat on a sea of sports bars and laundromats.⁴⁰

One way to account for the discrepancy between an idealized conception of entrepreneurship and the mundane reality of most new business ventures is to divide businesses into “strong” and “weak” entrepreneurial categories: “Entrepreneurial opportunities may be novel in a strong sense, which typically implies a technological breakthrough backed by venture capital financing, or they may be novel in a weak sense, such as opening a new restaurant in a vacant building.”⁴¹ However, the distinction only highlights the fact that the vast majority of new businesses are decidedly low-tech and do not seek to capitalize on the creation of new information.⁴² It is doubtful, for instance, that individuals planning to open a neighborhood pub would confront questions very different than those faced by their predecessors in previous decades and even centuries.⁴³

If taken as the model, businesses capitalizing on “strong” innovation would create a false picture by overemphasizing the importance of a small subset of high-technology ventures that involve the search for a truly novel product or service.⁴⁴ The core subject matter—“strong” entrepreneurship—

NEXUS 4–5 (2003) (distinguishing conceptual definition of entrepreneurship as “the discovery, evaluation and exploitation of opportunities” and operational definitions based on “self employment” or “the founding of a new business”).

⁴⁰ STEVEN L. WINTER, *A CLEARING IN THE FOREST: LAW, LIFE, AND MIND* 77 (2001) (noting that human reasoning tends to rely upon “prototypes” even though “the rationalist model defines category membership in terms of common properties, [and] every category member should be the same in the relevant respect”). Also, we would be hard pressed to explain why, in terms of innovation and opportunity, the founding of Apple counts as entrepreneurship but the launch of the iPhone does not.

⁴¹ Ibrahim & Smith, *supra* note 2, at 84–85.

⁴² See SHANE, *supra* note 39, at 20 (“[M]ost entrepreneurial opportunities are . . . constructive to established ways of doing things.”).

⁴³ The to-do list almost writes itself: find a location; decide what kind of food and liquor to serve; research local licensing requirements (including any zoning rules about where pubs can be sited); negotiate a commercial lease; get a liquor license; remodel as needed; obtain the necessary kitchen equipment; advertise. For a few more details, see *How to Start a Pub*, EHOW.COM, http://www.ehow.com/how_16584_start-pub.html (last visited Mar. 29, 2011).

⁴⁴ See SHANE, *supra* note 39, at 8 (distinguishing between “grand Schumpeterian . . . innovations that result in new combinations that spur creative destruction” and “a type of innovation that is much milder, such as placing a restaurant on a different corner of an intersection from existing restaurants”).

extends not much further than the range of scholarship concerning venture capital and is too narrow to support ambitious claims about law and entrepreneurship as a field.⁴⁵

B. *The Problem of Non-Distinctiveness*

Assuming that entrepreneurship could be “located” within a reasonably limited set of factual contexts,⁴⁶ its status as a legal field would depend also upon the distinctiveness of the legal rules needed to regulate it. Professor Ibrahim and Dean Smith offer three examples as “preliminary answers” to the question of whether “a distinct set of legal rules or legal practices [is] implicated in connection with entrepreneurial opportunities.”⁴⁷ Although I cannot fully explore the ways that law and entrepreneurship might intersect, I will take their examples as emblematic.

First, Ibrahim and Smith report an empirical study suggesting that California has higher levels of entrepreneurship than Massachusetts in part because California courts hesitate to enforce non-competition agreements and trade secrets.⁴⁸ According to Ibrahim and Smith, though, the “most interesting” aspect of the study was the author’s “decision to combine two legal rules from different doctrinal categories—the rules governing non-competition agreements from employment law and the rules governing trade secrets from intellectual property law—to illuminate the effect of law

Professor Shane argues that entrepreneurship can involve the creation of new information (a view he associates with Joseph Schumpeter) or a new use of resources based on existing information (a view he associates with Israel Kirzner). *Id.* at 20 (“Kirznerian opportunities reinforce established ways of doing things, whereas Schumpeterian opportunities disrupt the existing system.”).

⁴⁵ On the other hand, why not? Who is to say that a legal field must encompass a certain percentage of the national economy to be valid? My judgment in text that venture capital is too narrow a subject matter is not supported by any objective criteria for what counts as a field or a sub-field. But this is itself part of the problem. The process of categorization involves determinations of scope that are, if not arbitrary, then determined by collective social judgments rather than any formal definition. See, e.g., WINTER, *supra* note 40, at 101–02.

⁴⁶ I reserve for Part III consideration of whether it is helpful to act as if a concept like entrepreneurship is an object that can be found on a map. See Pierre Schlag, *The Aesthetics of American Law*, 115 HARV. L. REV. 1047, 1051 (2002) (describing “grid aesthetic” in which “subjects, doctrines, elements, and the like are cast as ‘object-forms.’ They exhibit the characteristic features of objects: boundedness, fixity, and substantiality.”).

⁴⁷ Ibrahim & Smith, *supra* note 2, at 85.

⁴⁸ *Id.* at 82 (citing Ronald J. Gilson, *Engineering a Venture Capital Market: Lessons from the American Experience*, 55 STAN. L. REV. 1067 (2003)). Knowledge more easily transferred to new users and potential entrepreneurs can establish new firms. *Id.*

on the mobility of entrepreneurial employees.”⁴⁹ Ibrahim and Smith conclude that “[t]he interplay of such generally applicable rules forms a distinctive slice of entrepreneurship” in that “the act of compiling a body of entrepreneurship law can entail reshuffling the deck, extracting laws from their current doctrinal categories and creating a new category.”⁵⁰

In litigation, however, it is unexceptional for former employers to bring claims based upon non-competition agreements and trade secret law whether an employee goes over to an established competitor or seeks to start a new venture.⁵¹ Where available, the employer would also likely assert claims for unfair competition.⁵² In other words, law and entrepreneurship is not “reshuffling the deck”—it is merely identifying the cards that a former employer would play. That these cards may come from different legal categories shows that a single factual scenario may implicate multiple legal causes of action, but this is often true.⁵³

On the other hand, the cited study of non-competition law does illustrate the impact that general legal rules can have on entrepreneurship. Whether or not the “general rules governing non-competition agreements and trade secrets find *novel* expression in the entrepreneurial context,”⁵⁴ they do apply and shape the ability of individual entrepreneurs to pursue opportunities independently. A state that wanted to encourage the growth of start-up companies might therefore choose to liberalize the laws concerning competition and trade-secret enforcement.⁵⁵ Thus, the impact that entrepreneurial concerns can have on the shape of legal rules seems well worth studying regardless of whether there are any special legal rules that apply (or should apply) in the context of entrepreneurship.

⁴⁹ Ibrahim & Smith, *supra* note 2, at 85.

⁵⁰ *Id.*

⁵¹ See 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARK AND MONOPOLIES § 16:16 (4th ed. 2010).

⁵² See John D. Finnerty et al., *Calculating Damages in Broker Raiding Cases*, 11 STAN. J.L. BUS. & FIN. 261, 261 (2006) (“When a securities broker or dealer ‘raids’ another firm’s branch office or trading desk, it improperly hires away a significant number of the raided firm’s producers.”).

⁵³ See Aagaard, *supra* note 20, at 227 (“Any particular situation that arises in the law potentially can be classified into numerous different categories. For example, an injury in the workplace could be characterized as a matter of, among other subject-matter categories, labor law, employment law, occupational safety and health law, tort law, criminal law, federal law, state law, common law, and statutory law.”).

⁵⁴ Ibrahim & Smith, *supra* note 2, at 85 (emphasis added).

⁵⁵ Any anticipated benefit, though, would have to be weighed against the cost of deterring productive alliances between individuals and companies by restricting the enforceability of voluntary agreements concerning access to and use of sensitive competitive information.

In a second example, Ibrahim and Smith claim that the law does apply distinctive rules “tailored to fit the entrepreneurial context.”⁵⁶ They observe that the Securities and Exchange Commission (“SEC”) exempts smaller companies from certain registration requirements, thereby permitting “entrepreneurs to avoid the expensive and cumbersome public offering process when seeking initial funding.”⁵⁷ From this evidence, they conclude that SEC rules “implicitly recognize[s] entrepreneurship as an important organizational category.”⁵⁸ A simpler explanation for the exemption, though, is not a special solicitude for entrepreneurial activity but merely the SEC’s recognition that smaller businesses lack the economies of scale to handle complex regulatory requirements.⁵⁹ The SEC rules are beneficial to smaller scale entrepreneurs but need not have been intended to support the pursuit of novel opportunities.⁶⁰

Finally, turning from formal legal rules to actual practices, Ibrahim and Smith examine the structure of venture capital investments. They argue that “the unique attributes of venture capital contracting stem from the unique problems that arise in the pursuit of entrepreneurial opportunities.”⁶¹ Contract law, of course, gives parties the flexibility to tailor general legal principles to suit their particular needs without any need to alter the mandatory rules that govern the creation and interpretation of contractual relationships. However, the prevalence of common structuring choices in venture capital does suggest that there are shared governance and financing needs.⁶² Assuming that venture capital contracting has distinctive features, it remains to be established that those features are evidence of a broader field of law and entrepreneurship. Or, put differently, why isn’t venture capital the field?⁶³

⁵⁶ Ibrahim & Smith, *supra* note 2, at 85.

⁵⁷ *Id.* at 85–86.

⁵⁸ *Id.* at 86.

⁵⁹ See C. Steven Bradford, *Transaction Exemptions in the Securities Act of 1933: An Economic Analysis*, 45 EMORY L.J. 591, 611 (1996) (“The economic rationale for the small offering exemptions rests on economies of scale—the relative increase in the total costs and benefits of registration as the dollar amount of an offering increases.”).

⁶⁰ Professor Ibrahim and Dean Smith might respond that the SEC rules focus on the financing necessary for rapid growth, a characteristic of entrepreneurial ventures and not all small businesses, but this raises again the difficulties in defining entrepreneurship with precision.

⁶¹ Ibrahim & Smith, *supra* note 2, at 87.

⁶² For a discussion of how contracting enables entrepreneurs and venture capital investors to overcome incentives problems, for instance, see D. Gordon Smith, *The Exit Structure of Venture Capital*, 53 UCLA L. REV. 315 (2005).

⁶³ One might question whether this kind of a line-drawing question has much bearing on real-world problems. See Schlag, *supra* note 46, at 1065 (“Grid thinkers sometimes have a tendency to subdivide and distinguish endlessly.”). As the next

III. FROM FIELD TO LENS

Even if it were possible to define law and entrepreneurship as a field characterized by distinctive facts that call for a tailored legal approach, this Part contends that a better approach would be to treat entrepreneurship as a critical perspective. By avoiding the conceptual difficulties inherent in identifying categories, scholars can focus instead on core questions concerning the relationship of law, innovation, and opportunity.⁶⁴

A. *The Double Category*

As discussed previously, we might define entrepreneurship in terms of innovation—getting novel things done, in which case the central question is whether a business involves sufficient innovation to count as an entrepreneurial venture.⁶⁵ Alternatively, we might define entrepreneurship as the creation of new business ventures by individual entrepreneurs. Although the latter definition lacks a core conceptual framework, it marks a fairly clear distinction between small-scale startups and established businesses.

Thus “strength of innovation” and “scale of business” seem to be separate variables, and there are actually four possibilities against which law and entrepreneurship might be defined: strongly innovative large businesses; strongly innovative small businesses; weakly innovative large

Part contends, it might be preferable to simply set aside grid thinking and to approach law and entrepreneurship questions from a different perspective.

⁶⁴ At the same time, it would clarify the study of small business start-ups to focus on the legal issues most salient for self-employed individuals who bear the full risk of the enterprise—the original notion of entrepreneurship—without conflating the distinctive needs of small business owners with the law’s relationship to novelty and opportunity in general. See Sharma & Chrisman, *supra* note 3, at 12 (citing RICHARD CANTILLON, *ESSAY ON THE NATURE OF GENERAL COMMERCE* (Henry Higgs ed. & trans., Frank Cass & Co. 1959) (1734)) (noting that in its earliest usage, entrepreneurship meant “self-employment with an uncertain return”); see also Charles T. O’Kelley, *Berle and the Entrepreneur*, 33 SEATTLE U. L. REV. 1141, 1142 (2010) (citing ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 340–41 (1933)) (noting that the separation of ownership and control in the modern corporation as a departure from the “early nineteenth century world, [in which] the businessman was a sole proprietor—an entrepreneur—and he owned and controlled the business. He took the consequences, good (profits) or bad (losses), resulting from his operation of the business.”).

⁶⁵ For instance, we might ask whether the business involves the creation of new information or the exploitation of existing information. See, e.g., Ibrahim & Smith, *supra* note 2, at 85 (equating “technological breakthroughs” with “strong entrepreneurship”).

businesses; and weakly innovative small businesses. The following chart illustrates the point:

	Large Business	Small Business
Strong Form		
Weak Form	X	

Although non-innovative, large businesses fall outside any plausible definition of entrepreneurship, that exclusion still leaves three boxes and two plausible directions for defining the field.⁶⁶ If law and entrepreneurship focuses primarily upon the organization and financing of startup ventures, then the field is really about small business, regardless of the level of innovation.⁶⁷ On the chart, this version of the field would include the right-hand column. One might then identify venture capital and the distinctive needs of high-technology startups as a subfield characterized by strong-form entrepreneurship.⁶⁸ This subfield would fit within the top, right-hand box.

On the other hand, if law and entrepreneurship instead focuses on the law's relationship to novelty and opportunity, then weakly innovative small businesses would be excluded.⁶⁹ Instead, the chart's top row would encompass the field. In many cases, established firms may actually be more likely to develop novel products and services than smaller firms, given their ability to devote resources to research and development and

⁶⁶ Although the two approaches discussed in the text strike me as the most relevant to existing law and entrepreneurship scholarship, other divisions are possible. See SHANE, *supra* note 39, at 2 (identifying "two camps: those who want the field of entrepreneurship to focus exclusively on individuals and those who want the field of entrepreneurship to focus exclusively on external forces").

⁶⁷ This is a large and important topic. See O'NEAL & THOMPSON, *supra* note 14, at § 1:2 (citing Alfred F. Conrad, *The Corporate Consensus: A Preliminary Exploration*, 63 CAL. L. REV. 440, 458-59 (1975)) (noting absence of "reliable figures" but citing an estimate "that 95% of all corporations have 10 or fewer shareholders").

⁶⁸ This kind of entrepreneurship is built into "operational definitions" that measure entrepreneurship according to levels of self employment or by "the founding of a new business, which is defined as the forming of a business venture or not-for-profit organization that previously was not in existence. SHANE, *supra* note 39, at 5.

⁶⁹ Cf. SHANE, *supra* note 39, at 9 ("[E]ntrepreneurship can be explained by considering the nexus of enterprising individuals and valuable opportunities.").

their greater access to market information.⁷⁰ At the very least, this possibility cannot be excluded by definition.⁷¹

Applying a categorical approach, therefore, it is hard to define law and entrepreneurship as a field of study because it seems to combine aspects of two categories: it can claim both a distinctive factual setting and a distinctive conceptual framework. However, these two understandings of entrepreneurship move in different directions (vertically or horizontally on the chart printed above). As discussed in the next section, though, this is more a debater's point than a telling objection; the Law of the Horse itself is a narrow way of arguing about what law means and does not exhaust the potential value of law and entrepreneurship.

B. *A Focal Lens*

Ultimately, it does not seem very important whether law and entrepreneurship can answer Judge Easterbrook's challenge. The ontological status of law and entrepreneurship has nothing to do with the value of academic programs and scholarship focused on the distinctive needs of small business owners. Nor should questions about categorization and sub-categorization obscure the contributions of scholars who explore law's impact on innovation and opportunity.

In short, the difficulties in defining the field seem to arise more from the effort to create a mapped grid of legal space than from any stumbling block in actually applying legal analysis to entrepreneurial issues. For example, as Professor Pierre Schlag explains, "[o]ne problem posed by the multiplication of classification schemes is simple: What happens when some lines of division in one scheme *sometimes* register in some other set

⁷⁰ *Id.* at 22 (contending that because strong entrepreneurship "involve[s] the creation of new knowledge, as well as its recognition . . . large, established firms may invest in efforts to endogenize the discovery and exploitation of [those] opportunities"). Large-scale businesses, especially in manufacturing, may also support innovation by enabling "engineers and factory workers" to develop the expertise needed to "produce the next innovations." Louis Uchitelle, *When Factories Vanish, So Can Innovators*, N.Y. TIMES, Feb. 13, 2011, at B5 (noting possible connection between a "loss of manufacturing capacity" in the United States and "the odds of a Henry Ford or a Thomas Edison or a Steve Jobs appearing in the next generation").

⁷¹ SHANE, *supra* note 39, at 9. Moreover, law and entrepreneurship might encompass government investment in new technologies. See James Surowiecki, *Sputnikonomics*, NEW YORKER, Feb. 14, 2011, at 44 ("[O]ur track record of using public money to foster innovation is good."). As the author observes, "investments in military technology . . . gave us, among other things, satellites, the microchip, G.P.S., and the Internet, the cumulative benefits of which are incalculable." *Id.*

and *sometimes not*? Which classification scheme enjoys priority over the other—or are they coequals?”⁷²

To the extent that classification schemes overlap, visual representations of legal categories (including my chart, *supra*) amount to a “graphic admission that . . . coherence is a sometimes thing.”⁷³

However, nothing requires us to represent law as a series of interlocking, two-dimensional boxes; there are other ways to conceptualize legal rules and principles.⁷⁴ For instance, especially when more than one legal rule or principle appears to apply, it may help to invoke an “energy aesthetic” in which “[c]onflicting forces of principle, policy, values, and politics collide and combine in sundry ways.”⁷⁵ Professor Schlag further identifies a “perspectivist aesthetic” based on “the social or political identity of the legal actor or observer.”⁷⁶ Another version of the “perspectivist aesthetic” might include the shared questions that unify a group of scholars and drive their analysis of law—and this is what I mean by a “lens” version of law and entrepreneurship.

To get past Judge Easterbrook’s organizing conception of law, it may help to recognize that both the “entrepreneurship as field” and “entrepreneurship as lens” characterizations are metaphors in that they describe “one thing in terms of another.”⁷⁷ To say that law and entrepreneurship is a lens for understanding how law, innovation and opportunity relate is not to claim that law and entrepreneurship is literally a curved piece of glass.⁷⁸ Likewise, although the definition of an academic discipline as a field suggests an open area in the discipline’s conceptual map, no one thinks that an academic field is literally an open space devoid of trees, buildings or other structures.⁷⁹ Metaphors built on aspects of our

⁷² Schlag, *supra* note 46, at 1063 (emphasis in original).

⁷³ *Id.*

⁷⁴ According to Professor Schlag, the basic framework through which we understand law is an aesthetic choice, not in terms of beauty or harmony, but in the original sense of “perception or sensation” and “pertains to the forms, images, tropes, perceptions, and sensibilities that help shape the creation, apprehension, and even identity of human endeavors, including, most topically, law.” *Id.* at 1050.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1052.

⁷⁷ GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY 5 (1st ed. 1980) (defining metaphor as “understanding and experiencing one kind of thing in terms of another”).

⁷⁸ Definition of *Lens*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/lens> (last visited Mar. 5, 2011) (defining lens as “a piece of transparent material that has two opposite regular surfaces either both curved or one curved . . . for forming an image by focusing rays of light”).

⁷⁹ Definition of *Field*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/field> (last visited Mar. 5, 2011) (defining field as “an open

physical world are necessary because we cannot grapple with entrepreneurship or any other abstract, intellectual concept without some grounding in the physical world. We are, after all, embodied entities ourselves and our “human rationality” accordingly “is not linear and criterial to begin with, but imaginative and adaptive.”⁸⁰ The issue, therefore, is not whether law and entrepreneurship *is* a field or a lens, but whether it is helpful to use one of those metaphors.

The lens metaphor offers important advantages. By setting aside worries about the boundaries of entrepreneurship as a location, we can start to think of entrepreneurship, not just as a category distinction, but as a way of talking about the law’s relation to innovation and opportunity.⁸¹ Law and entrepreneurship differs from other kinds of business law scholarship in its particular attention to the role of individuals (alone, in groups or within established organizations) who identify and respond to opportunity. Law and entrepreneurship scholarship gains power, therefore, if it is allowed to range widely across commercial settings, exploring the various intersections of law, innovation and opportunity. Indeed, some scholars may use the perspective to explore innovative responses to non-commercial problems, including the strategies adopted by “social entrepreneurs.”⁸²

The particular view of law’s coherence that gives the Law of the Horse objection its apparent force turns out not to be very useful as a way of understanding law and entrepreneurship. After all, we can respond to the

land area free of woods and buildings”). While the dictionary definition of “field” also denotes an academic area of study, that secondary meaning works because of metaphor. See WINTER, *supra* note 40, at 50 (“The fact that a fully acculturated person can go straight to the conventional meaning . . . does not indicate that a metaphor is ‘dead,’ only that it need not be conscious.”). The meaning of the word “field” still depends upon “the underlying conceptual mapping that structures its semantic content.” *Id.* at 51. For instance, the structure enables us to use “field” and “area” as synonyms. *Id.* (stating that one test for a metaphor’s vitality is whether it “is systematic—that is, does it account for a range of expressions, including related or complementary conceptions”).

⁸⁰ WINTER, *supra* note 40, at 6 (“Imagination . . . is dependent on the kinds of bodies that we have and on the ways in which those bodies interact with our environment. It is grounded in the sense that it is contingent on these experiences.”).

⁸¹ Cf. Seamus Heaney’s relational description of human identity and emotion: “If self is a location, so is love: Bearings taken, markings, cardinal points, Options, obstinacies, dug heels, and distance, Here and there and now and then, a stance.” SEAMUS HEANEY, *DISTRICT AND CIRCLE* 12 (2006).

⁸² Hobbs, *supra* note 13, at 241 (citing FREDERIC M. SCHERER & MARK PERLMAN, *ENTREPRENEURSHIP, TECHNOLOGICAL INNOVATION, AND ECONOMIC GROWTH: STUDIES IN THE SCHUMPETERIAN TRADITION* 1 (Frederic Scherrer & Mark Perlman eds., 1992)) (observing that the concept of entrepreneurship can be extended to non-economic activity).

needs of ordinary small businesses and high-tech venture capital startups while also studying the broader relationship of law and novelty, and we can do all this without demanding a common factual context that governs a specific body of legal rules. Instead we identify shared perspectives, common questions and distinctive needs.

Although a full development of the argument is beyond the scope of this brief Foreword, it may be useful in other areas of law to recognize that unique factual contexts are sometimes less important than shared perspectives. Consider, for instance, the supposedly fundamental distinction between private law and public law. The factual distinction, as a number of scholars have demonstrated, is actually rather slippery. Private law contracts, after all, require and presuppose a great deal of regulation, institutional structure and other public choices. If contested, courts determine whether there is a contract and if so, its terms and enforceability. In short, the boundary between public and private law is thin.⁸³

Yet, the questions central to what we think of as private and public law are distinctive. The questions in turn reflect different perspectives on law, and it is this difference that explains why public and private law serve as fundamental ordering concepts, notwithstanding the porous boundaries between them. In private law, we might ask whether an arrangement advances the autonomy interests of the parties. More simply, how can individuals order their affairs collectively to achieve desired economic and social ends? Public law scholars tend to ask other kinds of questions: What is the role of the state? What rights do individuals have against coercive state power? How can individual preferences be aggregated to accurately reflect social choices? Just as law and entrepreneurship can serve as an intellectual framework apart from any particular factual context, other legal fields might also form around the strength of a shared inquiry.

IV. CONCLUSION

If, as Professor Ibrahim and Dean Smith claim, law and entrepreneurship's core concern is with novelty and opportunity, then law and entrepreneurship is best understood as a perspective rather than as a factually distinctive subject matter. Although there may be little practical distinction—entrepreneurship clinics, classes, and journals would continue as before—the proposed lens metaphor is a more helpful organizing framework for the study of law and entrepreneurship. Questions about innovation and opportunity are integral to business law of every stripe and are not limited to startup ventures and small firms. Sharply defined categories can be an indispensable aid to reasoning, but they are also

⁸³ See STEPHEN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* (1st ed. 1999).

artificial and can mislead. Time spent on the taxonomical exercise of identifying the boundaries of the field of law and entrepreneurship⁸⁴ could better be used addressing its central questions:⁸⁵ How does the law encourage or discourage innovation?⁸⁶ How do “legal doctrines *shape* entrepreneurial opportunities?”⁸⁷

⁸⁴ See Ibrahim & Smith, *supra* note 2, at 79 (contending that entrepreneurship has the distinctiveness required to count as a legal field “despite well-known difficulties in defining its boundaries”).

⁸⁵ Admittedly, this Foreword is vulnerable to a *tu quoque* objection, because it takes up room in an established journal in the field of law and entrepreneurship debating the existence of the field rather than advancing the state of scholarship with respect to any of the issues with which law and entrepreneurship is concerned.

⁸⁶ See, e.g., Ronald J. Gilson, *The Legal Infrastructure of High Technology Industrial Districts: Silicon Valley, Route 128, and Covenants Not to Compete*, 74 N.Y.U. L. REV. 575, 578 (1999) (contending that state law rules incentivized high-tech startups in California and inhibited their formation in Massachusetts).

⁸⁷ Ibrahim & Smith, *supra* note 2, at 88 (emphasis in original).

